

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Section 304 of the
Telecommunications Act of 1996
Commercial Availability of
Navigation Devices
Cable One, Inc.'s
Request for Waiver of Section 76.1204(a)(1) of the
Commission's Rules
CS Docket No. 97-80
CSR-8080-Z

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2009

Released: May 28, 2009

By the Commission:

I. INTRODUCTION

1. Cable One, Inc. ("Cable One") has filed the above-captioned waiver request (the "Waiver Request"), seeking a limited waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules. The American Cable Association, Avenue Broadband Communications, Inc., the Consumer Electronics Association ("CEA"), Harron Communications, L.P., JetBroadband VA, LLC, and The World Company, d/b/a Sunflower Broadband filed comments in response to the Waiver Request and Cable One filed reply comments. For the reasons stated below, we grant Cable One's request.

II. BACKGROUND

A. Section 629 of the Act

2. Congress directed the Commission to adopt regulations to assure the commercial availability of navigation devices more than ten years ago as part of the Telecommunications Act of 1996. The Commission implemented this directive in 1998 through the adoption of the "integration ban," which established a date after which cable operators no longer may place into service new navigation devices (e.g., set-top boxes) that perform both conditional access and other functions in a

1 See Section 629(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(a) (requiring the FCC "to adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor"); see also Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125-126 (1996).

single integrated device.² Originally, the Commission established January 1, 2005 as the deadline for compliance with the integration ban.³ On two occasions, the National Cable and Telecommunications Association (“NCTA”), on behalf of all cable operators, sought – and obtained – extensions of that deadline.⁴ The Commission ultimately fixed July 1, 2007 as the deadline in order to afford cable operators additional time to determine the feasibility of developing a downloadable security function that would permit compliance with the Commission’s rules without incurring the cable operator and consumer costs associated with the separation of hardware.⁵

3. The purpose of the integration ban is to assure reliance by both cable operators and consumer electronics manufacturers on a common separated security solution.⁶ This “common reliance” is necessary to achieve the broader goal of Section 629 – *i.e.*, to allow consumers the option of purchasing navigation devices from sources other than their MVPD.⁷ Although the cable industry has challenged the lawfulness of the integration ban on three separate occasions, in each of those cases the D.C. Circuit denied those petitions.⁸ In limited circumstances, however, operators may be eligible for waiver of the integration ban.⁹

B. The Waiver Request

4. On October 31, 2008, Cable One filed a petition seeking a conditional waiver of the integration ban as provided in the *2005 Deferral Order* to allow Cable One to deploy low-cost, limited-capability, one-way cable set-top boxes with integrated security and high-definition (“HD”) capabilities in

² See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14803, ¶ 69 (1998) (“*First Report and Order*”) (adopting Section 76.1204 of the Commission’s rules, subsection (a)(1) of which (1) required multichannel video programming distributors (“MVPDs”) to make available by July 1, 2000 a security element separate from the basic navigation device (*i.e.*, the CableCARD), and, in its original form, (2) prohibited MVPDs covered by this subsection from “plac[ing] in service new navigation devices ... that perform both conditional access and other functions in a single integrated device” after January 1, 2005); see also 47 C.F.R. § 76.1204(a)(1) (1998).

³ *First Report and Order*, 13 FCC Rcd at 14803, ¶ 69.

⁴ In April 2003, the Commission extended the effective date of the integration ban until July 1, 2006. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) (“*Extension Order*”). Then, in 2005, the Commission further extended that date until July 1, 2007. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6810, ¶ 31 (“*2005 Deferral Order*”).

⁵ *2005 Deferral Order*, 20 FCC Rcd at 6810, ¶ 31.

⁶ See *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220, 226, ¶ 19 (2007) (citing the *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30) (explaining why the Commission “require[d] MVPDs and consumer electronics manufacturers to rely upon identical separated security with regard to hardware-based conditional access solutions”).

⁷ See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004). As the Bureau noted, Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”

⁸ *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008); *Charter Comm., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000). The Commission argued, and the D.C. Circuit agreed, that the integration ban was a reasonable means to meet Section 629’s directive. *Charter Comm., Inc. v. FCC*, 460 F.3d 31, 41 (D.C. Cir. 2006) (“this court is bound to defer to the FCC’s predictive judgment that, “[a]bsent common reliance on an identical security function, we do not foresee the market developing in a manner consistent with our statutory obligation.”).

⁹ 47 U.S.C. § 549(c); *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

its Dyersburg, Tennessee cable system, which is a system that serves approximately 7,000 subscribers.¹⁰ Cable One asserts that “virtually every cable network is offered (or shortly will be offered) in HD; virtually every new television purchased is HD-capable, and manufacturers are poised to mass produce low-cost, limited functionality HD-capable set-tops in 2009.”¹¹ Cable One contends that these marketplace developments have rendered obsolete the concerns that led the Commission to indicate in the 2005 *Deferral Order* that the low-cost, limited capability waiver standard would not be made available for set-top devices with HD capability. It also asserts that granting the requested waiver would serve the public interest by promoting the commercial sale of HD television sets.¹²

5. Cable One explains that because most cable programmers require the encryption of HD programming,¹³ most HD programming is only accessible by a CableCARD-equipped device. Cable One states that the least expensive, currently available CableCARD-equipped set-top box is available to cable operators for between \$300 and \$400 per unit and translates into a monthly customer charge of between \$8 and \$10 per unit.¹⁴ By contrast, Cable One states that a low-cost, limited functionality, one-way, HD capable set-top box will be commercially available for as little as \$50 per unit – a price point that would allow Cable One to offer subscribers one free device and additional devices for a monthly lease fee of no more than one dollar.¹⁵

6. Cable One lists as its current options: (1) do not upgrade its current analog-digital hybrid system to an all-digital system and, as a result of bandwidth constraints, continue providing subscribers with only a fraction of the HD programming available; so doing will support cost control but will limit its competitive position; (2) convert to an all-digital system in order to provide more HD channels and require customers to pay as much as \$10 or more for the more expensive compliant set-top box; (3) convert to an all-digital system and provide customers with a low-cost, limited-capability set-top box without HD capability that will rapidly become obsolete as consumers upgrade their television sets to HD; or (4) convert to an all-digital system and provide customers with a low-cost, limited-capability set-top box with HD capability that will meet customers’ current and future HD needs at a reasonable cost.¹⁶ It is the opinion of Cable One that Option 4 is the only real option that will meet its customers’ expectations for expanded HD programming choices at a reasonable rate.¹⁷

7. As conditions for waiver, Cable One commits, with respect to its Dyersburg system, to (i) transition to all-digital within one year of the order granting waiver; (ii) provide, for a minimum of five years, at least 50 HD networks along with the service tier that carries those same networks in SD, and at no additional charge; and (iii) for the same five-year period, provide one HD box to its subscribers at no cost, and provide additional boxes for a monthly fee of no more than one dollar per box.¹⁸ Cable One asserts that this option is most appealing because it will allow the company to expand its HD offerings at

¹⁰ Waiver Request at 1.

¹¹ *Id.* at 4 (citations omitted).

¹² *Id.* at 10.

¹³ Cable One Reply at 3.

¹⁴ Waiver Request at 5.

¹⁵ *Id.* at 2, 6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 2. Cable One makes this commitment under the assumption that the wholesale price for this HD capable all-digital device will be \$50 or less. Cable One also commits to notify its customers of its transition to all-digital, purchase an adequate number of devices to ensure a smooth transition, and provide sworn declarations regarding the same, as the Media Bureau has required in other “all-digital” set-top box waiver orders. *Id.* at 12 n.26 (citing *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209, 218, ¶ 27 (“*BendBroadband Order*”)).

a reasonable price to consumers, and at a price point that makes sense for Cable One.¹⁹ Cable One argues that this line of reasoning is a logical extension of the Commission's "low-cost, limited capability" policy. Cable One acknowledges that it is critical for consumers to have access to inexpensive set-top boxes that will permit viewing of digital programming on analog sets after a cable operator transitions to digital, but argues that there are equally strong public policy reasons to provide consumers who own HD sets a low-cost set-top box option as well.²⁰ Cable One argues that the Commission would serve the public interest better if it were to allow the deployment of low-cost, limited-capability devices with HD capability rather than only allowing the deployment of low-cost, limited-capability devices without such capability. According to Cable One, nearly all new television sets are HD sets.²¹ Therefore, Cable One argues that deploying a large number of low-cost, limited-capability set-top boxes without HD functionality would be wasteful, as they would not allow consumers to enjoy the full capabilities of those new sets, and may stand as an impediment to subscribers purchasing these sets.²²

8. Cable One does not believe that these devices will have an effect on the development of a market for navigation devices, as Cable One will still need to separate security for the advanced, two-way devices that it deploys.²³ The American Cable Association, Avenue Broadband Communications, Inc., Harron Communications, L.P., JetBroadband VA, LLC, and The World Company, d/b/a Sunflower Broadband each filed comments in support of Cable One's request, arguing that a grant of the request would serve the public interest.²⁴

9. CEA strongly disagrees with Cable One's assertion that waiver would not affect the retail market for navigation devices.²⁵ CEA stresses that spotty CableCARD support has been a problem for years, and that allowing Cable One to avoid its obligation to rely on CableCARDS in its own devices will only exacerbate the problem.²⁶

10. CEA also notes that for competitive reasons all cable operators will inevitably transition to all-digital systems and that the all-digital waiver orders were granted to provide an incentive for cable operators to make their digital transitions on an expedited basis.²⁷ As Cable One has not committed to this expedited timeframe for its all-digital transition, CEA urges the Commission not to use the transition as justification for a waiver.²⁸ As an alternative to waiver of the integration ban for low-cost HD set-top boxes, CEA suggests that Cable One could deliver its programming "without a waiver, through standard unencrypted MPEG-2 QAM cable transmissions or through a nationally portable, competitively neutral conditional access interface (either the CableCARD or another technology that is equally portable and available to competitive entrants)."²⁹

¹⁹ Waiver Request at 11-14.

²⁰ *Id.* at 14-15.

²¹ *Id.* at 4 (citing *The Bridge*, Vol. 6, No. 44 (Oct. 30, 2007)).

²² *Id.* at 5-6; Cable One Reply at 5.

²³ *Id.* at 14.

²⁴ ACA Comments at 2-4; Avenue Broadband Comments at 1-2; Harron Comments at 1-2; JetBroadband Comments at 1-2; Sunflower Broadband Comments at 2-3.

²⁵ CEA Comments at 4-5.

²⁶ *Id.* at 4.

²⁷ *Id.* at 2-3. See *BendBroadband Order*, 22 FCC Rcd at 217, ¶ 24 (granting waiver of the integration ban based on BendBroadband's commitment to transition to an all-digital network "prior to the end of analog, over-the-air broadcasts by full-power television stations.").

²⁸ CEA Comments at 3.

²⁹ *Id.* at 3.

11. Cable One replies to CEA's comments stating that CEA members no longer market HD as an "advanced" feature, and that "the functionality to receive and display HD content is found on virtually every television set available for purchase today."³⁰ Cable One also asserts that grant of the Waiver Request would have no effect on the retail market for navigation devices because CEA's members do not offer low-end Unidirectional Digital Cable Products ("UDCPs").³¹ Cable One dismisses CEA's suggestion that Cable One should offer unencrypted programming because cable programmers do not allow unencrypted delivery of HD content.³² Cable One further contends that use of CableCARD devices does not present a reasonable solution because such devices are prohibitively costly at "\$300 to \$400 per" device.³³ Finally, Cable One reasserts its position that waiver will further the public interest, for the same reasons provided in the Waiver Request.³⁴

III. DISCUSSION

12. Cable One makes its request for waiver pursuant to Sections 1.3 and 76.7 of the Commission's rules, as clarified by the low-cost, limited-capability standard set forth in the Commission's *2005 Deferral Order*.³⁵ As discussed below, we find good cause to grant Cable One's waiver under Sections 1.3 and 76.7 of the Commission's rules because (1) the limited functionality, one-way device Cable One plans to deploy is unlikely to have a significant effect on the retail market for navigation devices, (2) the one-way, HD set-top device presents a low-cost, HD option for consumers, and (3) the instant case presents us with an opportunity to examine the effect of a waiver of the integration ban for a one-way, HD set-top box without the potential for disrupting the national retail market for navigation devices. We believe that this narrow waiver will strike the proper balance between our goal of a thriving retail market for navigation devices and the goal of preserving a low-cost set-top box option that cable operators can deploy without fearing that the device will soon be obsolete. Although Cable One's request does not meet the low-cost, limited-capability waiver standard articulated in the *2005 Deferral Order* because the device has functionality beyond that which is necessary to promote the ability to view digital signals on analog television sets, we believe that, with the passage of time, it is appropriate to add HD functionality to the list of one-way capabilities that can qualify for a waiver of the general rule.³⁶ In 2005, the Commission's tuner mandate had not yet become fully effective and consumers who were purchasing HD sets were likely to be using it as their primary set. Now, however, consumers are purchasing sets of all sizes with HD capabilities and using them throughout their homes. In many cases, consumers do not want two-way interactivity for these sets but simply want to be able to watch one-way programming. Our 2005 policy allows cable operators to obtain a waiver of the integration ban for limited functionality devices serving these consumers, so long as the devices only provide an analog signal. In 2005, HD programming may have been an "advanced" service but today it is becoming commonplace. We see no reason to provide a regulatory incentive to deprive consumers of the HD-quality programming they expected and paid for when they purchased their sets.

³⁰ Cable One Reply at 2.

³¹ *Id.*

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.* at 4-6. See also ACA Comments at 2-4; Avenue Broadband Comments at 1-2; Harron Comments at 1-2; JetBroadband Comments at 1-2; Sunflower Broadband Comments at 2-3.

³⁵ Waiver Request at 7 (citing 47 C.F.R. §§ 1.3 & 76.7 and *2005 Deferral Order*, 20 FCC Rcd at 6794, ¶ 37).

³⁶ *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 FCC Rcd at 17120, ¶ 11 ("the waiver policy established in the *2005 Deferral Order* is directed at devices that provide solely the ability to view digital cable signals on analog television displays.").

13. We believe that a one-way, low-cost box with HD capability is unlikely to present a significant impediment to the development of a competitive retail market for navigation devices.³⁷ With the exception of HD capability, the boxes that we permit Cable One to deploy are in fact low-cost, limited-capability devices. As Cable One points out, many consumer electronics manufacturers have discontinued the manufacture of UDCPs because consumers are more interested in advanced two-way functions that UDCPs by definition cannot perform.³⁸ We believe that deployment of these devices will not endanger the development of a competitive marketplace because the more advanced two-way devices necessary to receive the electronic programming guide, video on demand, and other interactive features are still subject to the integration ban. This conclusion is conditioned on the assumption that Cable One will not, by action or omission, allow this device to achieve two-way compatibility with its system.³⁹

14. CEA asserts that the retail market for broadcast DTV converter boxes demonstrates that a competitive retail market for cable navigation devices is the best way to promote cable operators' transitions to digital cable. While we agree with CEA on this point, it is generally understood that the retail market has demonstrated that consumers do not have significant interest in one-way devices.⁴⁰ We believe that allowing Cable One to deploy a low-cost, limited-capability, one-way HD device will generate consumer benefits that will outweigh any limited effect it may have on the retail market for navigation devices. In addition, given the relatively small number of subscribers affected, granting Cable One's Waiver Request will provide us with an opportunity to examine the effect of a waiver for a low-cost, one-way HD set-top box without the potential for disrupting the national retail market for navigation devices.

15. Despite the support for our conclusions that we can draw from the existing market, this is the first waiver of the integration ban that we have granted to a traditional cable operator for a device with HD capability, and we cannot be certain about the effects it will have on the retail market for navigation devices. We will continue to observe the market to make certain that this waiver does not detrimentally affect the retail market for navigation devices. In order to facilitate our review, we will require Cable One to file an annual report with the Commission that includes, at a minimum, (1) the number of one-way, HD set-top boxes Cable One has deployed in its Dyersburg, Tennessee market; (2) the total number of CableCARDS Cable One has deployed for use in devices it leases in its Dyersburg, Tennessee market; and (3) the number of CableCARDS Cable one has deployed for use in retail devices in its Dyersburg, Tennessee market,. If we determine that the data that Cable One submits demonstrates a larger effect on

³⁷ Cable One argues that its proposal will *further* the goals of Section 629 because it will promote commercial sales of HD sets. Waiver Request at 10; Cable One Reply at 5. We disagree with Cable One's interpretation of Section 629's goals. Section 629 directs the Commission to adopt regulations to spur a retail market for devices that can be used to *navigate* MVPD services as opposed to devices that can be used to *view* MVPD services. Nevertheless, as discussed herein, we do not believe that this waiver will impede the goals of Section 629.

³⁸ Waiver Request at 9-10. *See also Implementation of Section 304 of the Telecommunications Act of 1996*, 22 FCC Rcd 12024, 12026, ¶ 5 (2007) ("It is apparent that consumers have not shown significant interest in one-way devices, which cannot access features such as EPGs, VOD, PPV, and other ITV capabilities provided by cable operators.").

³⁹ For example, CableLabs has developed a "tuning adaptor" for use with certain UDCPs that allow those devices to tune channels delivered using switched-digital technology. *See* CableLabs' Switched Digital Video Tuning Adapter FAQ, <http://www.cablelabs.com/udcp/downloads/Switched-Digital-Video-Tuning-Adapter-FAQ.pdf> (last visited April 22, 2009). Cable One must ensure that its one-way HD devices are not compatible with a similar devices that would give the one-way HD devices two-way capability.

⁴⁰ *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, 22 FCC Rcd 12024, 12026, ¶ 5. Devices like those designed by TiVo and Digeo, which achieve two-way communication using the Internet for upstream communications, have garnered consumer interest.

the retail market for navigation devices than we expected, then we will consider revocation of this waiver going forward.

16. Cable One's Waiver Request provides a list of set-top specifications which includes detailed specifications for the a/v output. The detail, however, does not identify an IEEE 1394 interface, which is required for all HD set-top boxes under Section 76.640(b)(4)(ii) of the Commission's rules.⁴¹ We recognize that the inclusion of an IEEE 1394 output would provide additional functionality for home-networking and recording capability. Under the circumstances of this particular waiver request, however, we believe that the costs to consumers of imposing the IEEE 1394 output requirement would outweigh the potential benefits.⁴² Because this grant is limited in scope, and to provide a low-cost, one-way HD box for customers, we find good cause to waive the IEEE 1394 requirement on our own motion.⁴³

IV. CONCLUSION

17. Cable operators currently do not deploy one-way, HD devices, and given the limited scope of this waiver, we do not believe that grant of this waiver will have an appreciable effect on the retail market for navigation devices or device connectivity. We find that there is good cause to grant Cable One's request for a limited waiver of Section 76.1204(a)(1) of our rules in its Dyersburg, Tennessee system with respect to the devices described in the Waiver Request. This waiver is subject to the customer notification and inventory commitments as sworn to by Michelle Cameron in the declaration accompanying the Waiver Request⁴⁴ as well as the requirement that Cable One file a report within one year of the date of this waiver, as set forth in Paragraph 15, above.

V. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, the request for waiver filed by Cable One, Inc. of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED** as conditioned in this order.

⁴¹ 47 C.F.R. § 76.640(b)(4)(ii).

⁴² There is some dispute regarding the cost of complying with the IEEE 1394 output requirement. IEEE 1394 proponents assert that the cost to include an IEEE 1394 port on a set-top box is "a few dollars." Letter from Scott Blake Harris, Counsel to Texas Instruments, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 97-80, at Attachment (filed September 11, 2008). Some opponents of the requirement, however, assert that the per-device cost is actually higher because of the costs associated with reengineering set-top boxes to include the output. Regardless of the precise cost of the 1394 requirement, we believe that the additional cost would be inconsistent with the purpose of this grant, *i.e.*, to provide a low-cost HD box for consumers. We therefore find good cause to waive the IEEE 1394 requirement.

⁴³ 47 C.F.R. § 1.3.

⁴⁴ See Waiver Request at 17. Those commitments are (1) to notify subscribers of Cable One's intent to convert to an all-digital system within 60 days of the release of this *Order* and a second notice six months later, (2) to ensure that at least six months after the release of this *Order* Cable One has in inventory or placed orders for enough of the low-cost, HD set-top boxes described in this order to ensure that each of the subscribers in Cable One's Dyersburg system can continue to view Cable One's video programming after the Dyersburg system has transitioned to all-digital, (3) to complete the transition of the Dyersburg system to an all-digital system within a year of the release of this *Order*, and (4) to submit sworn affidavits to the Commission confirming compliance with these commitments.

19. **IT IS FURTHER ORDERED** that, pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, waiver of Section 76.640(b)(4)(ii) of the Commission's rules, which requires that operators include an IEEE 1394 interface in high-definition set-top boxes **IS GRANTED** to Cable One, Inc. with respect to the low-cost, one-way boxes Cable One, Inc. deploys in its Dyersburg, Tennessee system.

20. **IT IS FURTHER ORDERED** that Cable One, Inc. **SHALL FILE** a report of the market for navigation devices, as described in paragraph 15 of this Order, within one year of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary